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In the Matters of)

Computer III Remand Proceedings:)
Bell Operating Company Safeguards and)
Tier 1 Local Exchange Company)
Safeguards)

CC Docket Number 90-623

Application of Open Network Architecture)
and Nondiscrimination Safeguards to)
GTE Corporation)

CC Docket Number 92-256

**REPLY OF THE INDEPENDENT DATA COMMUNICATIONS
MANUFACTURERS ASSOCIATION, INC.**

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I. INTRODUCTION

The Independent Data Communications Manufacturers Association, Inc. ("IDCMA") by its counsel, hereby replies to the comments filed regarding local exchange carriers' use of Customer Proprietary Network Information ("CPNI").

In its opening comments, IDCMA argued that the prior authorization requirement -- which currently obligates the Bell Operating Companies ("BOCs") and GTE to obtain prior customer approval before using CPNI of customers with more than 20 telephone lines to develop or market enhanced services -- should be applied to CPNI used to develop or market customer premises equipment ("CPE").¹ IDCMA also argued that the prior authorization rule should apply to all local exchange carriers ("LECs") and should protect the CPNI of all customers.² The comments demonstrate considerable support for the application of the prior authorization requirement to all carriers and to all customers.³ Although the question whether the CPNI rules should be applied equally in the enhanced services and CPE contexts was less extensively discussed, the record provides a more than sufficient basis for adoption of IDCMA's proposal to do so.

¹ See Comments of the Independent Data Communications Manufacturers Association ("IDCMA Comments") at 4-7.

² See id. at 7-9.

³ See, e.g., Comments of the Public Utility Commission of Texas ("Texas PUC Comments") at 11; Comments of the Information Technology Association of America ("ITAA Comments") at 4-6; and Initial Comments of the National Association of Regulatory Utility Commissioners at 4-5.

II. THE RECORD SUPPORTS REQUIRING LECs TO OBTAIN PRIOR CUSTOMER APPROVAL BEFORE USING CPNI TO DEVELOP OR MARKET CPE

In its comments, IDCMA explained that the current regulatory asymmetry -- in which the prior authorization requirement applies in the enhanced services context, but not in the CPE context -- undermines both the Commission's competitive and privacy goals. Comments submitted by the North American Telephone Association ("NATA"), the Information Technology Association of American ("ITAA"), and the Texas Public Utilities Commission ("Texas PUC") support IDCMA's position.

As NATA observes, the "competitive value of CPNI is comparable for CPE and for enhanced services."⁴ Therefore, allowing carrier personnel to use CPNI to develop or market CPE -- while requiring non-carrier CPE vendors to obtain prior customer authorization before accessing this information -- puts non-carrier CPE vendors at a competitive disadvantage.⁵ Moreover, as ITAA notes, the current regulatory asymmetry also distorts "inter-modal" competition between CPE-based and enhanced services-based solutions.⁶

Allowing carrier personnel to access CPNI to develop or market CPE also destroys any privacy protection that is provided by limiting the access of carrier personnel to this

⁴ Comments of the North American Telecommunications Association ("NATA Comments") at 10.

⁵ As we noted in our opening comments, the competitive concerns raised by the CPNI rules will become even more serious if the current MFJ restrictions on BOC manufacturing of telecommunications equipment (including CPE) are lifted.

⁶ ITAA Comments at 6. For example, end-to-end protocol conversion can be accomplished either through a services-based or an equipment-based solution. Allowing an LEC to use CPNI to market a CPE-based protocol conversion service plainly gives the carrier an advantage against non-carrier ESPs seeking to provide service-based protocol conversion.

information when they seek to use it to develop or market enhanced services. Therefore, as the Texas PUC concludes, "the same CPNI safeguards that are necessary . . . in [connection with] the provision of enhanced services are necessary in the provision of CPE."⁷

Only two commenters -- Ameritech and NYNEX -- opposed application of the prior customer authorization requirement to CPNI used to develop or market CPE. Neither commenter discussed its position in any detail. However, their opposition appears to rely on three basic arguments: (1) the CPE market is a competitive one in which the LECs have only a small market share;⁸ (2) the Commission previously declined to impose a prior authorization requirement in the CPE context based on its conclusion that consumers are aware of the competitive nature of this market;⁹ and (3) application of the prior authorization rule in the CPE context "would serve no competitive purpose" while resulting in "increased cost and a decrease in efficiency and innovation."¹⁰ These arguments are without merit.

1. Competition in the CPE Market. Ameritech and NYNEX assert that requiring carrier personnel to obtain prior customer authorization before using CPNI to develop or market CPE is not necessary because the CPE market is competitive.¹¹ However, the existence of competition in the CPE market is not determinative. The reason for the prior

⁷ Texas PUC Comments at 12.

⁸ Comments of Ameritech ("Ameritech Comments") at 11; NYNEX's Comments on the Rules Governing Telephone Company Use of CPNI ("NYNEX Comments") at 10.

⁹ Ameritech Comments at 11; NYNEX Comments at 10 n.12.

¹⁰ NYNEX Comments at 10; see Ameritech Comments at 11.

¹¹ Ameritech Comments at 11; NYNEX Comments at 10.

authorization rule is because the BOCs, GTE, and the other LECs continue to have monopoly power in the local exchange market. That monopoly power, often protected by state law, provides LECs with the exclusive right to obtain CPNI.

Absent a prior authorization requirement, LECs have the ability to leverage their local exchange monopoly by using CPNI to obtain an unfair competitive advantage in the closely related CPE market. While this has not allowed the LECs to eliminate competition in the CPE market, it has doubtless provided them with a "leg up" in developing and marketing CPE. The Commission can and should act to ensure that the LECs are not able to use their local exchange monopoly to obtain any unfair competitive advantage in this important market.

2. Prior FCC Findings Regarding Customer Awareness of Competition.

Relying on language in the Computer III Phase II Order, Ameritech further contends that application of the prior authorization rule is not necessary because the Commission has found that "users are sufficiently aware of the competitive nature of the CPE market that an initial [carrier] solicitation would not result in a sale, but would probably result in the customer contacting another vendor for a competitive bid."¹² NYNEX suggests that the Commission reaffirmed this conclusion in the Computer III Remand and, therefore, gave the BOCs discretion to determine whether to obtain prior customer authorization before using CPNI to develop or market CPE.¹³ These assertions are unfounded.

¹² Ameritech Comments at 10.

¹³ NYNEX Comments at 10 n.12.

The Computer III Phase II Order concerned the rules applicable to the BOCs' use of CPNI to develop or market enhanced services. In considering this issue, the Commission did recall its earlier finding, in the BOC CPE Relief Order, that market forces (including consumer awareness of competition) were sufficient to allow BOC personnel involved in the marketing of CPE to access CPNI without prior customer approval. The Commission went on to find that the same market factors "are also applicable to the . . . unseparated provision of enhanced services" and, therefore, that it was not necessary to adopt prior authorization requirement in the enhanced services context.¹⁴

What the carriers fail to note, however, is that -- following the Ninth Circuit's decision in California v. FCC¹⁵ -- the Commission subsequently revisited and rejected the conclusion that it had reached in the Computer III Phase II Order. Notwithstanding consumer awareness of competition, the Commission concluded in the Computer III Remand Order that the BOCs' "unrestricted access to CPNI does give [them] an advantage over competing ESPs in marketing enhanced services."¹⁶ Based on this conclusion, the Commission imposed the prior authorization requirement on the BOCs in the enhanced services context.

Contrary to NYNEX's suggestion, the Computer III Remand Order did not consider the question of the applicability of the CPNI rules in the CPE context -- much less

¹⁴ Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry, Phase II), 2 FCC Rcd 3072, 2094-95 (1987), vacated sub nom. California v. FCC, 905 F.2d 1217 (9th Cir. 1990).

¹⁵ 905 F.2d 1217 (9th Cir. 1990).

¹⁶ Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571, 7611 (1991) [hereinafter "Computer III Remand Order"].

affirmatively determine that "application of the CPNI rules to CPE should be left to the BOCs."¹⁷ Rather, the Commission merely noted that "the rules applicable to the use of CPNI in marketing CPE are not affected by this Order."¹⁸

The Commission's decision not to consider the applicability of the prior disclosure rules in the CPE context is entirely understandable. As IDCMA explained in its opening comments,¹⁹ and as NATA observed in its comments,²⁰ the Computer III Remand proceeding was limited to enhanced service issues raised by the Ninth Circuit in its California v. FCC decision. To the extent the Computer III Remand decision is relevant in the CPE context, it suggests that Ameritech's rationale for LECs continued preferential access to CPNI -- customer awareness of competitive alternatives -- has been rejected by the Commission.

3. Competition, Privacy, and Efficiency. Ameritech and NYNEX's suggestion that application of the prior authorization rule to CPE would provide no competitive benefits, and would fail to provide user privacy, while impairing carrier efficiency is insupportable. In the Computer III Remand Order, the Commission concluded that application of a prior customer authorization requirement (at least in connection with the CPNI of the BOCs' multiline customers) strikes the appropriate balance among competitive, privacy, and efficiency concerns in the enhanced services context.²¹ Having reached this conclusion, the Commission

¹⁷ NYNEX Comments at 10 n.12.

¹⁸ Computer III Remand Order, 6 FCC Rcd at 7613 n.167.

¹⁹ See IDCMA Comments at 4-5.

²⁰ See NATA Comments at 5.

²¹ Computer III Remand Order, 6 FCC Rcd at 7612.

observed, it was "not only authorized but obligated to change [its] rules"²² and require prior customer authorization in the enhanced services context.

No party has demonstrated that the FCC's assessment in the Computer III Remand Order was incorrect. Indeed, even NYNEX supports retention of the current prior authorization rules in the enhanced service context.²³ Nor has any party suggested a basis for distinguishing the competitive, privacy, and efficiency concerns in the CPE context from those in the enhanced service context. To the contrary, the record evidence demonstrating that the disparate CPNI rules in the CPE and enhanced services contexts distorts inter-modal competition makes it all the more important to adopt a uniform prior authorization rule. Therefore, the Commission is "not only authorized but obligated to change [its] rules" and apply the prior authorization requirement to CPE. Indeed, the Commission should go even further and extend the prior authorization requirement to all LECs and protect the CPNI of all customers.

III. CONCLUSION

For the foregoing reasons, as well as those stated in IDCMA's opening comments, the Commission should amend the CPNI rules to apply the prior customer authorization requirement to carrier personnel who seek to use CPNI to develop and market CPE. The prior disclosure requirement, as so amended, should then be applied to all customers and all LECs.

²² Id. at 7613.

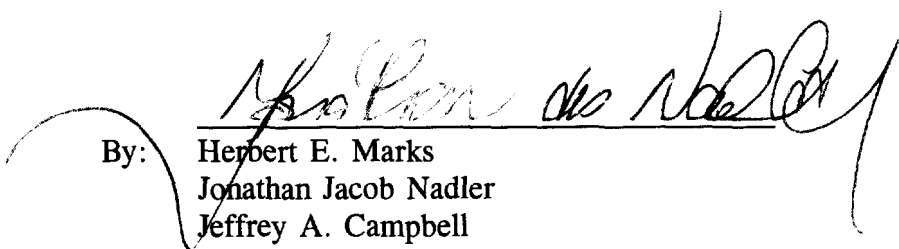
²³ See NYNEX Comments at 5.

Such equal application of the CPNI rules will promote competitive equity and preserve user privacy without imposing an undue burden on these carriers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jeffrey A. Campbell, hereby certify that a copy of the foregoing Reply of the Independent Data Communications Manufacturers Association, Inc. has been served this 19 day of May, 1994, to all parties on the attached list.



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